

Hassan A. Zavareei (SBN 181547)
hzavareei@tzlegal.com
TYCKO & ZAVAREEI, LLP
2000 L Street, N.W., Suite 808
Washington, DC 20036
Tel.: (202) 973-0900
Fax: (202) 973-0950

Jeffrey M. Ostrow
ostrow@kolawyers.com
KOPELOWITZ OSTROW, P.C.
200 SW 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Tel: (954) 525-4100
Fax: (954) 525-4300

Byron T. Ball (SBN 10195)
btb@balllawllp.com
THE BALL LAW FIRM, L.L.P.
10886 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90024
Tel: (310) 446-6148
Fax: (310) 441-5386

*Attorneys for Plaintiffs, Amber Hawthorne,
Christopher Kneer, and Victoria Kneer*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

AMBER HAWTHORNE, CHRISTOPHER KNEER, and VICTORIA KNEER on Behalf of Themselves and All Others similarly situated,

Civil Action No.: 3:11-cv-06700-JST

Honorable Jon S. Tigar

**PLAINTIFFS' OPPOSITION TO
DEFENDANT UMPQUA BANK'S MOTION
FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs,

VS.

UMPOUA BANK,

Defendant.

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INTRODUCTION

Plaintiffs Amber Hawthorne, Christopher Kneer, and Victoria Kneer, on behalf of themselves and all others similarly situated (“Plaintiffs”) allege that Defendant Umpqua Bank (“Umpqua” or the “Bank”) made misrepresentations to them about the way the Bank ordered their debit card transactions. Plaintiffs’ monthly statements—the document that Umpqua explicitly directs its consumers to carefully review to keep track of their finances—falsely represented that the customers’ transactions were being ordered from lowest to highest. This was the exact *opposite* order that Umpqua actually used. In reality, the transactions were ordered, in undisclosed groups, from highest to lowest. Plaintiffs alleged that Umpqua did this in order to maximize the overdraft fees it could charge Plaintiffs and charge other overdraft fees even when Plaintiffs accounts were not overdrawn. That scheme, when implemented by Wells Fargo Bank, was described by the Honorable William Alsup as “motivated by avarice at the depositor’s expense.” *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1124 (N.D. Cal. 2010) (“*Gutierrez I*”) *aff’d in part, rev’d in part and remanded sub nom. Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712 (9th Cir. 2012).

The Bank’s misrepresentations also infected the Terms and Conditions that purportedly governed the Plaintiffs’ relationship with the Bank. [Dkt. No. 15-2]. In those Terms and Conditions, Umpqua claimed that it would post the largest and “most important” transactions first. This was false. Instead, the Bank sorted only *certain* transactions high-to-low into one group, then sorted other transactions high-to-low in another group—another deliberate, but more subtle effort to increase overdraft fees. Similarly, the suggestion that this posting order was a benefit to the customers because “more important” items would be posted first is an outright lie. After a full trial in *Gutierrez*, Judge Alsup determined that a similar suggestion by defendant Wells Fargo was patently false because: (1) there could be no benefit in the case of electronic transactions (as opposed to checks), and (2) the resulting excessive overdraft fees were inescapable. *Gutierrez I*, 730 F. Supp. 2d at 1105. Thus, the Terms and Conditions’ representation that more important items would be paid first under the Bank’s posting order was false and misleading. This case is based on these and other affirmative misrepresentations made by the Bank.

1 Despite the fact that every claim in this case is grounded in affirmative misrepresentations,
 2 the Bank is asking the Court to grant judgment pursuant to Fed. R. Civ. P. 12(c). *See Motion for*
 3 *Judgment on the Pleadings* (the “Motion”) [Dkt. No. 41]. The Motion is based almost entirely on
 4 the Ninth Circuit’s ruling in the appeal of Judge Alsup’s decision, *Gutierrez v. Wells Fargo Bank*,
 5 N.A., 704 F.3d 712 (9th Cir. 2012). As discussed below, however, the Ninth Circuit upheld the
 6 claims against Wells Fargo that were premised on misrepresentations by the bank. Specifically, the
 7 Ninth Circuit found that whether a bank could order transactions high-to-low was exclusively
 8 governed by the National Bank Act of 1864 (“NBA”), 13 Stat. 99 (codified at 12 U.S.C. § 1 *et seq.*)
 9 and its implementing regulations. *Gutierrez*, 704 F.3d at 722-725. Thus, the plaintiffs’ claims that
 10 high-to-low reordering violated a California law requirement that such ordering be done in “good
 11 faith” was contrary to, and preempted by, the NBA. *Id.* at 725 (“The federal court cannot mandate
 12 the order in which Wells Fargo posts its transactions.”). On the other hand, the Ninth Circuit held
 13 that claims based on Wells Fargo’s misleading statements about the posting order were not
 14 preempted because they do not interfere with the NBA’s direct powers over banks, including
 15 disclosure requirements:

16 As a non-discriminating state law of general applicability that does not “conflict
 17 with federal law, frustrate the purposes of the National Bank Act, or impair the
 18 efficiency of national banks to discharge their duties,” the Unfair Competition
 Law’s prohibition on misleading statements under the fraudulent prong of the
 statute is not preempted by the National Bank Act.
 19 *Id.* at 726. Although the Ninth Circuit did not address any other claims based on misleading
 20 statements other than California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200
 21 (“UCL”), the reasoning applies to all laws of general applicability that are based on affirmative
 22 misrepresentations—as opposed to claims that a posting order is itself unlawful or that the bank
 23 should have made certain disclosures.

24 On remand, Judge Alsup reaffirmed his \$203 million damages award based on the
 25 “fraudulent” prong of §17200. The misrepresentations in that case are parallel to those here. Most
 26 notably, “the Wells Fargo online banking service displayed pending transactions to customers in
 27 chronological order, only to rearrange them in a high-to-low order at the time of posting in order to
 28 maximize the number of overdraft fees.” *Gutierrez v. Wells Fargo Bank*, N.A., C 07-05923 WHA,

1 2013 WL 2048030, at *2 (N.D. Cal. May 14, 2013) (“*Gutierrez II*”). Judge Alsup also ruled that
 2 Wells Fargo’s Consumer terms and conditions was “both difficult for customers to understand and
 3 misleading.” *Id.* at *2. Plaintiffs make the same allegations in the case at bar.

4 Even though Umpqua is not a national bank, it claims that the Ninth Circuit’s decision in
 5 *Gutierrez* serves to preempt all of the claims in this case except for the claim under the fraudulent
 6 prong of §17200. Even if the Court were to extend NBA preemption to Umpqua—it should not—
 7 this would not preempt Plaintiffs claims. Each of those claims (including the conversion, unjust
 8 enrichment and breach of the duty of good faith and fair dealing) are premised on alleged
 9 misrepresentations. As such, the Ninth Circuit’s preemption analysis establishes that those claims
 10 are *not* preempted because they do not allege that the Bank was required to order the transaction in a
 11 certain way, nor would they require any affirmative disclosures by the bank. Instead, they are
 12 claims seeking redress for affirmative misrepresentations based on state laws of general
 13 applicability.

14 **PROCEDURAL BACKGROUND**

15 Over one year ago, Judge Gonzalez Rogers denied Umpqua’s Motion to Dismiss certain of
 16 Plaintiffs’ claims. [Dkt. No. 30]. In that motion, Umpqua asked the court to dismiss Plaintiffs’
 17 unjust enrichment, conversion, and unconscionability claims in their entirety, as well as claims
 18 made by Plaintiffs under the “fraudulent” prong of California’s UCL. [Dkt. No. 19]. Umpqua did
 19 not move to dismiss Plaintiffs’ contract claims, nor its claims under the “unfair” or “unlawful”
 20 prongs of the UCL. *Id.* Judge Gonzalez Rogers held that Plaintiffs’ allegations that “the Bank used
 21 misleading account agreements which falsely led customers to believe that overdraft fees would
 22 only be charged when there were not sufficient funds in the account to cover a debit at the time it
 23 was made” and that Umpqua made “misrepresentations regarding posting order in the Bank’s
 24 account statements that hide the Bank’s high-to-low posting practices.” These misrepresentations
 25 were sufficient to state claims for violations of the UCL’s fraudulent prong and for unjust
 26 enrichment and conversion. [Dkt. No. 30] at 3.

27 The parties are currently engaged in discovery. Umpqua now comes before this Court with
 28 what is essentially another motion to dismiss. For the first time in this litigation, Umpqua argues

1 that the six-month-old Ninth Circuit decision in *Gutierrez* means that all of Plaintiffs' claims—other
 2 than their UCL "fraudulent" prong claim—are preempted. Because Plaintiffs' claims in this case
 3 are all predicated on alleged affirmative misrepresentations by the bank, those claims are not
 4 affected by the Ninth Circuit's ruling in *Gutierrez*.

5 **LEGAL STANDARD**

6 The same standard of review is applicable to a motion under Rule 12(c) as a motion under
 7 Rule 12(b). *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.1989). "[T]he
 8 allegations of the non-moving party must be accepted as true . . . Judgment on the pleadings is
 9 proper when the moving party clearly establishes on the face of the pleadings that no material issue
 10 of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach
 11 Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1990).

12 **ARGUMENT**

13 **A. The FDIA's parity provision does not preempt state law claims of general applicability.**

14 Umpqua argues that, by operation of the Federal Deposit Insurance Act's ("FDIA") parity
 15 provision at 12 U.S.C. § 1831a(j)(1), it may do business through its branches in California subject
 16 only to the same restrictions and limitations as may be imposed on national banks. That provision,
 17 meant to ensure that national banks do not receive preferential treatment over state banks, is not
 18 implicated here. Instead, the parity provision merely provides that the host-state laws apply to
 19 branches of out of state bank branches in those host states. 12 U.S.C. § 1831(a)(j)(1). This is called
 20 a parity provision because this is consistent with what the NBA provides for national banks. That
 21 parity provision—if anything—establishes that the California laws must govern Umpqua's activities
 22 in California (where Plaintiffs reside), since California is the host state. Notably, the parity
 23 provision of the FDIA says nothing about preemption.

24 Umpqua's Motion strains to show that a state bank is, for preemption purposes, treated the
 25 same as a national bank. It does so by relying on three non-binding cases from outside this
 26 jurisdiction: *Wells Fargo Bank of Tex., NA v. James*, 321 F.3d 488, 490 n.1 (5th Cir. 2003); *Johnson
 27 v. First Banks, Inc.*, 889 N.E. 2d 233 (Ill. App. 2008); *Pereira v. Regions Bank*, No. 6:12-cv-1383-
 28 Orl-22TBS, 2013 WL 265314 (M.D. Fla. Jan. 2, 2013). The first two cases have no analysis of this

1 issue. Indeed, the Fifth Circuit in the *Wells Fargo Bank of Tex.* case merely states in dicta contained
 2 in a footnote that that the FDIA's parity provision provides for preemption. *Wells Fargo Bank of*
 3 *Tex.*, 321 F.3d at 490 n.1. The only authority relied on by *Johnson* is the dicta (without analysis) in
 4 the *Wells Fargo Bank of Tex.* case. *See Johnson*, 889 N.E. 2d at 238. The only case with any
 5 analysis of this issue is *Pereira*, 2013 WL 265314, at *4. Notably, *Pereira* acknowledges that there
 6 is no clear indication that the parity provision of the FDIA provides for express preemption. *Id.* In
 7 light of this "ambiguous" provision, the court resorted to statutory interpretation, including an
 8 analysis of legislative history. Like Umpqua, *Pereira* relied on the comments of a congressman
 9 who stated that the parity act required out of state banks to comply with host-state laws "unless the
 10 State law has been preempted (with respect to) national banks." [Dkt. No. 41] at 6 (citing 143
 11 Cong. Rec. H3088-H3089 (daily ed. May 21, 1997)). This statement cannot be used to engraft
 12 express preemption—something that must be spelled out explicitly by Congress—onto the FDIA.
 13 *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("And
 14 ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not
 15 controlling in analyzing legislative history.") (citation omitted); *Chrysler Corp. v. Brown*, 441 U.S.
 16 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in
 17 analyzing legislative history."); *Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1209 (9th Cir. 1999) ("We
 18 accord this remark [by one senator] no interpretive weight.") (citing *Chrysler Corp.*, 441 U.S. at
 19 311); *Thompson v. Calderon*, 151 F.3d 918, 928-29 (9th Cir. 1998) (*en banc*) (Kleinfeld, J.
 20 concurring) ("individual senators do not make laws; majorities of the House and Senate do").

21 Even if these cases were correctly decided (they were not), their holdings are limited to a
 22 "finding that Congress intended to preempt the imposition of *host-state banking laws* on out-of-state
 23 state banks to the same extent that they are preempted as to out-of-state national banks." *Pereira*,
 24 2013 WL 265314, at *5 (emphasis added). *See also Wells Fargo Bank of Tex.*, 321 F.3d at 490 n.1
 25 (applying preemption to state "par value" statute that attempted to prohibit banks from charging
 26 certain fees); *Johnson*, 889 N.E. 2d at 331 (holding that state law making banks liable for wrongful
 27 dishonor of an item was preempted). Plaintiffs here are not trying to invoke a host-state banking
 28

1 law. They are trying to invoke laws of generally applicability. Plaintiffs can cite to no case holding
 2 that the parity provision of the FDIA preempts such claims.

3 Even assuming that the FDIA parity provision provides Umpqua with the protections of
 4 NBA preemption, no such preemption would apply here because Plaintiffs' claims are all premised
 5 on affirmative misrepresentations. And the Ninth Circuit has held that such claims are not
 6 preempted by the NBA.

7 **B. Each of Plaintiffs' claims is premised on Umpqua's misrepresentations relating to the
 8 posting order of debit card transactions.**

9 Judge Gonzalez Rogers previously recognized that Plaintiffs' allegations of Umpqua's
 10 misrepresentations were sufficient to establish the elements of the fraudulent prong of the UCL:
 11 "The Court finds that the allegations here adequately allege a violation of the UCL's fraudulent
 12 conduct prong. Plaintiffs allege that the Bank used misleading Terms and Conditions which falsely
 13 led customers to believe that overdraft fees would only be charged when there were not sufficient
 14 funds in the account to cover a debit at the time it was made. They also allege misrepresentations
 15 regarding posting order in the Bank's account statements that hide the Bank's high-to-low posting
 16 practices." [Dkt. No. 30] at 3. Specifically, Plaintiffs allege that Umpqua issued confusing,
 17 contradictory, and deceptive Terms and Conditions, then doubled down on its deception by issuing
 18 bank statements that blatantly misrepresented its true posting practices.

19 *First*, Umpqua misrepresented its true practices in its Overdraft Disclosure, telling plaintiffs
 20 it "may" reorder transactions only if there were funds to pay those transactions. Umpqua's
 21 "Overdraft Disclosure," an addendum to the Terms and Conditions stated:

22 If there are funds to cover some but not all of the checks, withdrawals or other
 23 debits (such as charges) posting to your account, we *may* post these items, *for
 which there are funds*, in any order we may choose at our sole discretion.

24 [Dkt. No. 15], ¶ 33 (emphasis added). This provision states, in effect, that "for items for which
 25 there are funds," Umpqua will pay *those* items "in any order." In other words, Umpqua promised
 26 Plaintiffs that it would, as a first step, isolate a group of transactions for which there were sufficient
 27 funds, then pay those "in any order." Plaintiffs allege that what Umpqua actually does, contrary to
 28 this contractual promise, is determine what the largest item is, then determine if there are sufficient

1 funds for *that* item. Even if there are not, Umpqua posts it anyway.¹ This is the very sort of
 2 confusing language that Judge Alsup found to be misleading in *Gutierrez II*, 2013 WL 2048030, at
 3 *2 (holding that terms and conditions that were “difficult for customers to understand and
 4 misleading” constituted misrepresentations).

5 **Second**, Umpqua’s Terms and Conditions were also confusing and misleading. For
 6 example, the Terms and Conditions stated that Umpqua would treat all types of transactions equally,
 7 when in fact it was using a sophisticated ordering scheme to pay certain types of transactions first in
 8 order to maximize fees. Umpqua falsely represented that it followed a simple, straightforward
 9 reordering process:

10 When processing checks or orders drawn on your account, our policy is to pay
 11 them according to the dollar amount. We pay the largest dollar items first by
 12 transaction type. If the small items are paid first, you may have fewer NSF or
 13 overdraft fees, but the largest, and perhaps most important items (such as rent or
 mortgage payments) might not be paid. However, if the largest items are paid
 first, your most important items might be paid but it may increase the overdraft or
 NSF fees if funds are not available to pay all of the items.

14 [Dkt. No. 15], ¶ 37. In fact, it used a complicated system of “bucketing” transactions into certain
 15 categories, which were then prioritized in a manner to extract the greatest possible number of
 16 overdraft fees. *See id.*, ¶ 42 (“Umpqua chose to post certain ‘transaction types’ before others in
 17 order to maximize overdraft fee revenues[.]”). For this reason, these confusing and misleading
 18 provisions of Terms and Conditions amounted to misrepresentations.

19 The Terms and Conditions also characterize the largest transactions are the “most important”
 20 ones, and claim the Bank’s posting practices will ensure these important transactions are paid first.
 21 That implies that Umpqua would modify any posting order on a case-by-case basis to ensure the
 22 most important transactions were paid first. That did not happen. As Judge Alsup found in
 23 *Gutierrez I*, there is no benefit to the consumers in paying debit card transactions in a high-to-low
 24 order. While that argument may have some merit with checks, which could be declined, the debit
 25

26 ¹ To use a simple example: a customer has a \$100 balance in her checking account, and 4 incoming
 27 transactions for \$1000, \$500, \$50, and \$20. The contractual term reproduced above means that
 28 Umpqua was first required to determine which of the items are “items for which there are funds.” In the example, the only items that qualify are the \$50 and \$20 items. Per the contract, then, Umpqua must pay *those* transactions first, “in any order.” Instead, Umpqua would pay the \$1000 and \$500 first.

1 card transactions at issue here are “must pay” items. Thus, no matter what posting order the Bank
 2 uses, those transactions (important, unimportant, large, or small) will be paid. Thus, the suggestion
 3 that high-to-low reordering confers a benefit on the consumers is false and misleading:

4 The supposed net benefit of high-to-low resequencing is utterly speculative. Its
 5 bone-crushing multiplication of additional overdraft penalties, however, is
 6 categorically assured. Thus, wholly apart from the fact that the rationalization has
 7 no applicability to debit-card transactions (due to their “must pay” aspect), the net
 harm to depositors from the practice is so plain and so vast that this order rejects
 completely that high-to-low resequencing is a net benefit to depositors or
 preferred by them.

8 *Gutierrez I*, 730 F. Supp. 2d at 1105.

9 The Terms and Conditions also advised customers to “make careful records and practice
 10 good account management,” because such care “will help you to avoid writing checks or drafts
 11 without sufficient funds and incurring the resulting fees.” Judge Alsup explicitly found that
 12 encouraging customers to use check registers to avoid overdraft fees “promoted a false perception”
 13 because even a “precise register could never alert a customer who makes a mistake that her one
 14 overdraft will be converted into as many as ten overdrafts.” *Id.* at 1105.

15 Finally, the most blatant misrepresentations were made in the very documents that Umpqua
 16 claimed (in its Terms and Conditions) that the customers were required to review. [Dkt. No. 15-2]
 17 at 2 (“You *must* examine your statement of account with ‘reasonable promptness.’”) (emphasis
 18 added). When Plaintiffs did as directed, and examined their account statements, they were
 19 confronted by a bald-faced lie. Namely, monthly bank statements Umpqua issued showed “smaller
 20 dollar items—not larger dollar items . . . being paid first . . . [Therefore,] when an Umpqua customer
 21 views his or her account statement, they are looking at a total fabrication[.]” [Dkt. No. 15], ¶ 38.
 22 This, it must be noted, is despite contractual provisions which indicate Umpqua will provide
 23 *accurate* bank statements [Dkt. No. 15-2], at 3. In short, Umpqua rearranged transactions on bank
 24 statements to conceal its true posting practices.

25 As Judge Gonzalez Rogers stated in finding that Plaintiffs had adequately made UCL
 26 “fraud” allegations, Plaintiffs “allege misrepresentations regarding posting order in the Bank’s
 27 account statements that hide the Bank’s high-to-low posting practices.” [Dkt. No. 30], at 2. This is
 28 precisely the sort of misrepresentation that Judge Alsup recently found formed part of the basis for

1 reinstating the \$203 million judgment against Wells Fargo. *Gutierrez II*, 2013 WL 2048030, at *2
 2 (finding that “Wells Fargo made misleading statements directly to customers,” including that “the
 3 Wells Fargo online banking service displayed pending transactions to customers in chronological
 4 order, only to rearrange them in high-to-low order at the time of posting in order to maximize the
 5 number of overdraft fees.”); *see also Gutierrez I*, 730 F. Supp. 2d at 1117 (“Furthermore, when a
 6 customer used Wells Fargo’s online banking service, the bank would display ‘pending’ debit-card
 7 purchases in chronological order, leading customers to believe that the processing would take place
 8 in that order. In reality, debit-card purchases were never posted in this order during the class period,
 9 as the bank well knew. Nothing on the bank’s online-banking website warned customers that the
 10 pending transactions, displayed chronologically to them, would be resequenced behind the scenes
 11 and posted in high-to-low order to maximize overdrafts.”).

12 These affirmative misrepresentations form the basis for Plaintiffs’ UCL claims, conversion
 13 claims, unjust enrichment claims, and claims for the breach of the duty of good faith and fair
 14 dealing.

15 **C. *Gutierrez* did not preempt claims based on misrepresentation, fraud, or concealment.**

16 While the Ninth Circuit’s decision in *Gutierrez* held that state law claims based *solely* on a
 17 bank’s implementation or inadequate disclosure of a high-to-low posting order are preempted under
 18 the National Bank Act, it made clear that claims based on a bank’s misrepresentations as to the
 19 posting order utilized are *not* preempted. *Gutierrez*, 704 F.3d at 718. Because Plaintiffs’ claims
 20 here are based on Umpqua’s misrepresentations about its posting order, and because Plaintiffs
 21 allege that they were harmed as a result of Umpqua’s misleading statements regarding the posting
 22 order, their state law claims based on such misrepresentations are not preempted. Thus, *Gutierrez*
 23 militates against judgment on the pleadings.

24 The Ninth Circuit essentially found fault with the part of the lower court’s ruling that the
 25 high-to-low resequencing was *per se* unlawful under the UCL or that Wells Fargo was required to
 26 make any particular affirmative disclosures. “The federal court cannot mandate the order in which
 27 Wells Fargo posts its transactions.” *Id.*, at 725. But while Umpqua focuses on what the Ninth
 28 Circuit found preempted in *Gutierrez*, it ignores the lower court’s key holding that the Ninth Circuit

1 left standing; namely, that not even a national bank (which is clearly subject to the NBA's express
 2 preemption provision) is free to disregard the basic duties to avoid fraud, deception, and other basic
 3 common law duties: "California's prohibition of misleading statements does not significantly
 4 interfere with the bank's ability to offer checking account services, choose a posting method, or
 5 calculate fees." *Gutierrez*, 704 F.3d at 727 (citations omitted). The panel also emphasized that
 6 "[f]ederal law does not . . . preempt California consumer law with respect to fraudulent or
 7 misleading representations concerning posting." *Id.*, at 716. Nor did the panel in any way reverse
 8 or criticize Judge Alsup's holding that Wells Fargo violated the covenant of good faith and fair
 9 dealing. Specifically, Judge Alsup held that "having delegated itself discretion [under the
 10 contract]," Wells Fargo had "the duty to exercise that discretion in accordance with the covenant of
 11 good faith and fair dealing. This precludes exercising that discretion to turn what would ordinarily
 12 be one overdraft into as many as ten." *Gutierrez I*, 730 F. Supp. 2d at 1122.

13 Plaintiffs in *Gutierrez* had claimed that Wells Fargo's "resequencing" practices were
 14 "unfair" under the UCL because they contradicted the legislative policy expressed in California
 15 Commercial Code § 4303(b) 1992 Amendment cmt. 7 ("Comment 7")—a provision that prohibited
 16 banks from choosing a post order in order to maximize overdraft fees. The panel held that claims
 17 based on such a state law, targeted specifically at banks, were preempted by the NBA. Plaintiffs in
 18 the instant case make no claim based on that prohibition. In fact, they make no reference to
 19 Comment 7 in their complaint. *See* Dkt. No. 15. None of the claims Plaintiffs make here require
 20 this Court to find that Umpqua's posting practices are *per se* unlawful, unfair, deceptive, or in
 21 violation of Comment 7.

22 Indeed, the Ninth Circuit's ruling is completely consistent with the thoughtful decision by
 23 the United States District Court for the Northern District of Georgia. *White v. Wachovia*,
 24 563 F. Supp. 2d 1358 (N.D. Ga. 2008). In that case, the Honorable Beverly Martin (now serving on
 25 the Eleventh Circuit) found that claims sounding in tort and contract were not preempted by the
 26 NBA because they did not interfere with the bank's deposit-taking powers. Unlike the "unlawful"
 27 and "unfair" allegations in *Gutierrez*, which were based on Comment 7 (a state law that arguably
 28 made high-to-low reordering unlawful), the claims in *White* and in all of the other high-to-low cases

1 across the country are based on general tort and contract law that prevent banks from saying one
 2 thing and doing another.

3 While the Ninth Circuit's decision affirmed Judge Alsup's factual findings, including that
 4 Wells Fargo had made misrepresentations that deceived plaintiffs, it vacated the judgment and
 5 instructed the lower court to reevaluate both damages and injunctive relief in light of the panel's
 6 preemption decision. On remand, Judge Alsup reinstated his original judgment in full. *Gutierrez II*,
 7 2013 WL 2048030. That decision found that "[o]ur court of appeals held that [the UCL] is a non-
 8 discriminatory state law of general applicability that did not impose disclosure requirements in
 9 conflict with federal law. Rather, it prohibited statements that are likely to mislead the public."
 10 *Gutierrez II*, 2013 WL 2048030 at *2. After restating the portions of his post-trial determination
 11 that Wells Fargo had affirmatively deceived plaintiffs—including by misstatements in marketing
 12 materials, contract materials, and on online bank statements—Judge Alsup ordered the same
 13 injunctive relief and damages he had ordered the first time around.

14 **D. The Ninth Circuit's *Gutierrez* Decision Provides No Support for Judgment on the
 15 Pleadings.**

16 The Ninth Circuit's decision in *Gutierrez* dealt solely with alleged violations of the UCL;
 17 the ruling did not concern the state common law claims for breach of contract and breach of the
 18 covenant of good faith and fair dealing, conversion and unjust enrichment at issue in the instant
 19 lawsuit. As for California's UCL—which it termed a “consumer protection statute of general
 20 applicability,” *Gutierrez*, 704 F.3d at 722—the panel held that, as a general matter, it did not
 21 interfere with banking powers and was *not* preempted. Indeed, the *Gutierrez* panel reinforced the
 22 fact that state laws can be applied to limit the activities of national banks:

23 Notably, the Unfair Competition Law itself does not impose disclosure
 24 requirements but merely prohibits statements that are likely to mislead the public.
 25 As a non-discriminating state law of general applicability that does not “conflict
 26 with federal law, frustrate the purpose of the National Bank Act, or impair the
 efficiency of national banks to discharge their duties,” the Unfair Competition
 Law’s prohibition on misleading statements under the fraudulent prong of the
 statute is not preempted by the National Bank Act.

27 *Id.* at 726.

1 Those claims—under laws of general applicability—are precisely the ones Plaintiffs make
 2 here. And if such claims are not preempted when made under the UCL, neither are they preempted
 3 when couched as common law claims. Yet Umpqua argues that they are barred by preemption. The
 4 Ninth Circuit rejected the same argument by Wells Fargo. Specifically, the Ninth Circuit rejected
 5 Wells Fargo’s argument “that a state law prohibiting misleading statements necessarily touches on
 6 ‘checking accounts’” because “such an expansive interpretation—with no limiting principle—
 7 ‘would swallow all laws.’” *Id.* at 727 (quoting *Aguayo v. U.S. Bank*, 653 F.3d 912 (9th Cir. 2011)).
 8 This Court should reject Umpqua’s attempt to use narrowly tailored preemption to “swallow all” of
 9 Plaintiffs’ claims made under state laws of general applicability.

10 **1. Plaintiffs’ “unlawful” and “unfair” prong UCL claims are not preempted.**

11 In its Motion, Umpqua argues that Plaintiffs’ unlawful and unfair prong UCL claims (though
 12 not their fraudulent prong claim) are preempted. Dkt. No. 41, at 14. Plaintiffs concede that
 13 *Gutierrez* requires them to prove each of their claims without reference to allegations that the high
 14 to low practice was *per se* unfair or deceptive. In other words, each of Plaintiffs’ claims must be
 15 tethered to some misrepresentation by Umpqua about its posting practices. As discussed below,
 16 Plaintiffs can meet this burden. To the extent Plaintiffs had, prior to *Gutierrez*, made allegations
 17 that Umpqua’s posting practices were *per se* unfair, those allegations provide no support for the
 18 causes of action in this case. But even without those allegations, Plaintiffs adequately allege non-
 19 preempted claims for violations of each of the UCL’s three prongs: “unlawful,” “unfair,” and
 20 “fraudulent.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180
 21 (1999) (citations omitted).

22 ***a. “Unfair” prong.***

23 An unfair business practice under the UCL is “one that either offends an established public
 24 policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”
 25 *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008) (omitting internal citations). To
 26 test whether a business practice is unfair, the Court must weigh the utility of the defendant’s
 27 conduct against the gravity of the harm to the alleged victim. *Bardin v. Daimlerchrysler Corp.*, 136
 28 Cal. App. 4th 1255, 1268 (2006). Plaintiffs concede that they cannot maintain an action under the

1 UCL's unlawful prong based on allegations that Umpqua's posting order was *per se* deceptive or
 2 unconscionable, or that it was required to make any particular affirmative disclosures. Nonetheless,
 3 Plaintiffs have alleged a claim that is not preempted, because they claim that Umpqua's
 4 misrepresentations are immoral, unethical, oppressive, unscrupulous, or substantially injurious to
 5 consumers. [Dkt. No. 15] ¶¶ 122-127. In the "unfairness" balancing test that this Court is obligated
 6 to undertake, there is no possible utility in lying about posting order, as Umpqua did on its bank
 7 statements and in its contract documents.

8 Misrepresentations or deceptions can form the basis for both a UCL fraud and a UCL
 9 "unfairness" claim. For example, in *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 253
 10 (2011), plaintiff made claims predicated on partial omissions by a lender in connection with option
 11 adjustable rate mortgage loans. "Plaintiffs' 'unfair' allegations also focus on the same material
 12 omissions/misleading disclosures in the loan documents." *Id.* The court criticized the lender's
 13 "byzantine descriptions" of the loan terms, which were "hidden in the complexity" of the various
 14 loan documents. *Id.* at 249. The court found that such misrepresentations formed the basis for a
 15 UCL fraudulent prong claim, as well as a "unfair" prong claim, even where "Plaintiffs' 'unfair'
 16 allegations also focus on the same material omissions/misleading disclosures in the loan
 17 documents" as in their fraud prong claim. *Id.* at 253. Similarly, in *Jordan v. Paul Fin., LLC*, 745
 18 F. Supp. 2d 1084, 1099 (N.D. Cal. 2010), where "plaintiffs' complaint relie[d] entirely on the face
 19 of the loan documents," the court held that plaintiffs had adequately stated claims under both the
 20 unfair and fraudulent prongs of the UCL. For the same reasons, the allegations of
 21 misrepresentations by Plaintiffs in this case can be used to satisfy both the fraudulent and unfair
 22 prongs of the UCL.

23 ***b. "Unlawful" prong***

24 Under the UCL's "unlawful" prong, violations of other laws are "borrowed" and made
 25 independently actionable under the UCL. *Cel-Tech.*, 20 Cal. 4th at 180. California Consumer
 26 Legal Remedies Act ("CLRA") violations may serve as the predicate for "unlawful" business
 27 practice actions under the UCL. *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 258 (2011),
 28 *reh'g denied* (Dec. 15, 2011), *as modified* (Dec. 28, 2011), *review denied* (Feb. 15, 2012). Plaintiffs

1 allege that Umpqua's practices relating to the imposition of overdraft fees violate the CLRA,
 2 specifically section 1770(a)(19) (inserting an unconscionable provision in the contract), 1770(a)(5)
 3 (representing that goods or services have sponsorship, approval, characteristics, ingredients, uses,
 4 benefits, or quantities which they do not have), 1770(a)(14) (representing that a transaction confers
 5 or involves rights, remedies, or obligations which it does not have or involve), and 1770(a)(1)
 6 (passing off goods or services as those of another). [Dkt. No. 15], ¶ 123. Plaintiffs allege these
 7 CLRA violations constitute unlawful business acts or practices within the meaning of the UCL. *Id.*

8 Defendants now argue that these CLRA provisions—the only ones Plaintiffs relied on for
 9 their UCL unlawful prong claim—are not applicable to financial transactions because the latter are
 10 not a “good or service.” The CLRA defines “services” as “work, labor, and services for other than a
 11 commercial or business use, including services furnished in connection with the sale or repair of
 12 goods.” Cal. Civ. Code § 1761(b). Plaintiffs complain about disclosures on the overall functioning
 13 of their checking accounts and debit cards—these constitute financial services under the CLRA.
 14 See, e.g., *Hitz v. First Interstate Bank*, 38 Cal. App. 4th 274, 286-88 (1995) (credit card agreements
 15 encompass convenience services *in addition to* an extension of credit and that, therefore, such
 16 agreements qualify as contracts for “services” under a non-CLRA statute); *Hernandez v. Hilltop*
 17 *Financial Mortgage, Inc.*, 622 F. Supp. 2d 842, 850-51 (N.D. Cal. 2007) (loan services, though not
 18 the loan itself, fell within the ambit of the CLRA). In *Jefferson v. Chase Home Finance LLC*, No.
 19 C06 6510 TEH, 2007 WL 1302984, at *3 (N.D. Cal. May 3, 2007) (improper application of
 20 prepayments to mortgage were “financial services”).

21 It is true that the extension of credit is not a good or service. But overdraft fees are not
 22 credit. Instead, they are treated as administrative charges: “case law exists which distinguishes
 23 loans from check transactions, and compels a determination that the payment of checks against an
 24 overdrawn account is not an extension of credit, and that the OD fee charged for such services is not
 25 interest.” *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1053 (S.D. Fla. 1998) *aff'd*,
 26 205 F.3d 1358 (11th Cir. 2000). Further, “[t]he implementation of OD and NSF fees was based on
 27 the banking industry’s awareness that a depositor often writes checks under the mistaken belief that
 28 he has, or will have, sufficient funds to cover the check, *without any intent to apply for credit*. The

1 imposition of the fee is solely contingent on the depositor's failure to comply with the terms of the
 2 deposit agreement[.]” *Id.* at 1054 (emphasis added). A recent state court decision in an identical
 3 overdraft fee litigation found that, contrary to defendant arguments, checking account overdraft fees
 4 were “goods and services” under their states’ consumer protection statutes. *See Jonathan Jones, et*
 5 *al. v. United Bank and United Bankshares, Inc.* (No. 11-C-50) (Circuit Court, Jackson County, West
 6 Virginia) (Sept. 28, 2011).

7 None of the cases Umpqua cites addresses the distinction, drawn by the *Video Trax* court,
 8 “between interest and administrative charges.” *Video Trax*, 33 F. Supp. 2d at 1041. The first case
 9 Umpqua relies on, *Consumer Solutions REO, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1015 (N.D. Cal.
 10 2009), concerns a mortgage loan. In finding that loan to be outside the scope of the CLRA, the
 11 court cited *Berry v. American Express Publishing, Inc.*, 147 Cal. App. 4th 224 (2007), which held
 12 that “*extension of credit, such as issuing a credit card*, separate and apart from the sale or lease of
 13 any specific goods or services, does not fall within the scope of the [CLRA]” (emphasis added).
 14 Similarly, the court in *Ball v. FleetBoston Fin. Corp.*, 79 Cal. Rptr. 3d 402, 404-405 (2008), another
 15 case cited by Umpqua, had a similar focus on the extension of credit: “the act of extending credit
 16 alone is not covered by the CLRA.” No extension of credit is at issue here. What are at issue are
 17 the checking account and debit card services offered by Umpqua. A checking account provides the
 18 service not of a *loan*, but of allowing Plaintiffs convenient access to their own money in diverse
 19 locations and times.

20 While it is true that Judge Alsup granted Wells Fargo’s summary judgment motion with
 21 respect to plaintiff’s CLRA claim, it did so because “Plaintiffs have not identified the purported
 22 [CLRA] good or service here.” *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 957 (N.D.
 23 Cal. 2009). Plaintiffs here identify the provision of checking accounts and debit cards as the
 24 relevant service. At the very least, Plaintiffs must be provided the opportunity, as the *Gutierrez*
 25 plaintiffs were, to build a record showing that they are indeed a “service.” Therefore, even if this
 26 Court disagrees as a matter of law with the holding in *VideoTrax*, *Hernandez*, and *Jefferson*, it is
 27 premature to dismiss Plaintiffs’ CLRA claim at this stage, without a factual record.

1 **2. Plaintiffs' breach of the covenant of good faith and fair dealing claims are not**
 2 **preempted.**

3 Umpqua argues that “[t]he rationale of *Gutierrez* applies with equal force to Plaintiffs’ claim
 4 for the breach of the implied covenant of good faith and fair dealing.” [Dkt. No. 41], at 11.
 5 According to Umpqua, an implied covenant claim would impose a “good faith limitation” on
 6 Umpqua’s pricing decision to set overdraft fees, in the same way the *Gutierrez* panel determined
 7 Cal. Com. Code § 4303(b), Calif. cmt. 7 did. But as discussed above, the dual “rationale” of the
 8 *Gutierrez* decision is that statutes *directed at* banks that interfere with pricing decisions are
 9 preempted, and also that no business (bank or not) is free to avoid basic duties to avoid fraud,
 10 deception, or other basic common law duties: “California’s prohibition of misleading statements
 11 does not significantly interfere with the bank’s ability to offer checking account services, choose a
 12 posting method, or calculate fees.” *Gutierrez*, 704 F.3d at 727. By that rationale, the implied
 13 covenant claim also does not interfere with Umpqua’s “pricing determinations.” Plaintiffs’ implied
 14 covenant claim merely demands that Umpqua, like every other contracting party in California, be
 15 required to exercise contractual discretion in good faith.

16 Nor is it true that, as Umpqua argues, Judge Alsup considered the UCL claim as “derived
 17 from” the implied covenant claim. Rather, the court made clear that the implied covenant claim is
 18 separate and distinct from a claim based on the UCC legislative comment. *Gutierrez I*, 730 F. Supp.
 19 2d at 1122 (citing *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985), a case about overdraft
 20 fees, for the proposition that “where a contract confers on one party a discretionary power affecting
 21 the rights of the other, a duty is imposed to exercise the discretion in good faith and in accordance
 22 with fair dealing.”).

23 Plaintiffs allege that Umpqua explicitly reserved for itself various types of discretion in the
 24 contract documents.² The covenant of good faith and fair dealing, implied by California law in
 25

26 ² In the Overdraft Disclosure, Umpqua stated: “If there are funds to cover some but not all of the
 27 checks, withdrawals or other debits (such as charges) posting to your account, *we may pay these*
 28 *items*, for which there are funds, *in any order we may choose* at our sole discretion” (emphasis
 added). [Dkt. No. 15], ¶ 33. The Terms and Conditions also states that “*we may, at our*
discretion, honor withdrawal requests that overdraw your account” (emphasis added). [Dkt. No.
 15], ¶ 34.

1 every contract, requires a party to use such discretion fairly. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th
 2 317, 349 (2000). “The covenant is implied as a supplement to the express contractual covenants, to
 3 prevent a contracting party from engaging in conduct that frustrates the other party’s rights to the
 4 benefits of the agreement” even if it does not technically violated the express terms of the
 5 agreement. *Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 36 (1995). *See also Ladd v. Warner Bros.*
 6 *Entm't, Inc.*, 184 Cal. App. 4th 1298, 1308 (2010) (party violated duty by using a fee computation
 7 method that unfairly undervalued fees owed, even if there was no express contractual obligation to
 8 calculate them differently).

9 The covenant of good faith and fair dealing, in sum, is a law of general applicability, one of
 10 our society’s background rules of the road that all businesses must follow. Unlike the UCC
 11 provision struck down by the Ninth Circuit in *Gutierrez*, it is a good faith command *moored to a*
 12 *contract*. It is a principle of contract interpretation from which banks receive no special exemption.
 13 *See White*, 563 F. Supp. 2d at 1358 (claim for breach of implied covenant of good faith and fair
 14 dealing not preempted as to national bank); *In re Checking Account Overdraft Litig.*, 694 F. Supp.
 15 2d 1302, 1313 (S.D. Fla. 2010) (same). It is therefore simply a confusion of concepts for Umpqua
 16 to say that by their covenant claim, “Plaintiffs . . . seek to impose a good faith limitation” on a
 17 bank’s activities in the same way Gutierrez’ UCC-based UCL claim did. To the contrary, Plaintiffs
 18 seek only to impose a good faith limitation *on the contract* Umpqua drafted for itself. That contract
 19 contained various discretion points. This court must interpret those discretion points fairly, or the
 20 contract as a whole would become meaningless, subsumed by Umpqua’s unfettered discretion to do
 21 whatever it likes.

22 **3. Plaintiffs’ unjust enrichment and conversion claims are not preempted.**

23 As discussed above, Plaintiffs claim Umpqua defrauded and deceived them when it
 24 misrepresented and concealed its debit posting practices. Plaintiffs’ unjust enrichment and
 25 conversion claims are based on the same misrepresentations, and do not require this Court to find
 26 that Umpqua’s posting order was *per se* unlawful or unfair. Umpqua appears to concede as much,
 27 since it agrees that this Court has found Plaintiffs have adequately alleged a UCL fraudulent claim,
 28 and that claim is not preempted. [Dkt. No. 41], at 2. That is a major concession, because the same

1 wrongful conduct (misrepresentations about posting order) can also be the basis for non-preempted
 2 unjust enrichment and conversion claims.

3 An unjust enrichment claim requires that the retention of the benefit be unjust due to some
 4 wrongful conduct. *Peterson v. Cellco Partnership* 164 Cal. App. 4th 1583 (2008). Similar logic
 5 applies to a conversion claim: “The elements of a conversion are the plaintiff’s ownership or right to
 6 possession of the property at the time of the conversion; the defendant’s conversion *by a wrongful*
 7 *act* or disposition of property right; and damages.” *Oakdale Village Group v. Fong*, 43 Cal. App.
 8 4th 539, 543–544 (1996) (emphasis added); *Uthe Tech. Corp. v. Aetrium, Inc.*, C 95-02377 WHA,
 9 2012 WL 4470536 (N.D. Cal. Sept. 27, 2012). By simple logic, therefore, Umpqua also concedes
 10 the conversion and unjust enrichment claims are not preempted.

11 Umpqua argues that this simple syllogism is undone by *Baptista v. JP Morgan*, 2010 WL
 12 2342436 (M.D. Fla. 2010), which concerned a Florida law specifically directed at banks. The court,
 13 not surprisingly, found that law preempted. Unlike Plaintiffs in this case, however, plaintiff in
 14 *Baptista* had no basis for his common law claims other than the violation of the preempted state
 15 law, and therefore those common law claims were preempted as well. That is not the case here,
 16 where Plaintiffs have alleged fraud, deception, and misrepresentation—and where Umpqua
 17 concedes those allegations are not preempted. Because Plaintiffs’ misrepresentation allegations can
 18 support both their UCL and common law claims, judgment on the pleading cannot be granted on
 19 any of them.

20 **E. Plaintiffs adequately allege an express breach of contract.**

21 Umpqua does not argue that Plaintiffs’ express breach of contract claim is preempted.
 22 Instead, it argues that “there can be no breach of contract where the conduct complained of is
 23 authorized by the agreement at issue.” [Dkt. No. 41], at 16. But as discussed at length in section
 24 A.1, *supra*, the Terms and Conditions and Overdraft Disclosure both misrepresent Umpqua’s true
 25 posting and overdraft fee practices. Specifically, the Overdraft Disclosure misrepresents how
 26 Umpqua decides whether or not transactions are ones “for which there are funds,” and Plaintiffs
 27 also allege that Umpqua misrepresented its true practices in the Terms and Conditions when it stated
 28 that it would pay “the largest dollar items first by transaction type” and would pay the “most

1 important" transactions first. Each of these misrepresentations provide the basis for a breach of
2 express contract claim.

3 **CONCLUSION**

4 For the foregoing reasons, this Court should not grant judgment on the pleadings on any of
5 Plaintiffs' claims.

6 Dated: May 28, 2013

7 Respectfully submitted,

8
9
10 /s/ Hassan A. Zavareei _____
11 Hassan A. Zavareei (SBN 181547)
12 hzavareei@tzlegal.com
13 **TYCKO & ZAVAREEI, LLP**
14 2000 L Street, N.W., Suite 808
Washington, D.C. 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950

15 Jeffrey M. Ostrow (*pro hac vice*)
16 ostrow@kolawyers.com
17 **KOPELOWITZ OSTROW, P.C.**
18 200 SW 1st Avenue, 12th Floor
Fort Lauderdale, FL 33301
Tel: (954) 525-4100
Fax: (954) 525-4300

19 Byron T. Ball (SBN 10195)
20 btb@balllawllp.com
21 **THE BALL LAW FIRM, L.L.P.**
22 10886 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90024
Tel: (310) 446-6148
Fax: (310) 441-5386

23 *Counsel for Plaintiffs and the Proposed Classes*

1 **CERTIFICATE OF SERVICE**

2 I, Hassan Zavareei, counsel for the Plaintiffs, hereby certify on May 28, 2013 that I have
3 served a true and correct copy of the foregoing via the Court's ECF system.

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5
6
7 /s/ Hassan A. Zavareei
8 **Hassan A. Zavareei**

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